



1 limited to whether a search of the plaintiff's cell was conducted  
2 in retaliation for the plaintiff's prison grievances regarding his  
3 alleged denial of access to courts.

4 Following the granting in part and denying in part of their  
5 motion for summary judgment, the defendants filed a motion for  
6 leave to file a successive motion for summary judgment (#93), which  
7 was granted (#96) by the United States Magistrate Judge.

8 Presently before the court is the defendants' successive  
9 motion for summary judgment (#94), filed on September 27, 2013.  
10 The plaintiff filed an objection (#101) on October 18, 2013, and  
11 the defendants replied (#104) on October 29, 2013.

## 12 **Standard**

13 Summary judgment shall be granted "if the movant shows that  
14 there is no genuine issue as to any material fact and the movant is  
15 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).  
16 The burden of demonstrating the absence of a genuine issue of  
17 material fact lies with the moving party, and for this purpose, the  
18 material lodged by the moving party must be viewed in the light  
19 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*  
20 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141  
21 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one  
22 that affects the outcome of the litigation and requires a trial to  
23 resolve the differing versions of the truth. *Lynn v. Sheet Metal*  
24 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*  
25 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

26 Once the moving party presents evidence that would call for  
27 judgment as a matter of law at trial if left uncontroverted, the  
28 respondent must show by specific facts the existence of a genuine

1 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
2 250 (1986). "[T]here is no issue for trial unless there is  
3 sufficient evidence favoring the nonmoving party for a jury to  
4 return a verdict for that party. If the evidence is merely  
5 colorable, or is not significantly probative, summary judgment may  
6 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla  
7 of evidence will not do, for a jury is permitted to draw only those  
8 inferences of which the evidence is reasonably susceptible; it may  
9 not resort to speculation." *British Airways Board v. Boeing Co.*,  
10 585 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*  
11 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event  
12 the trial court concludes that the scintilla of evidence presented  
13 supporting a position is insufficient to allow a reasonable juror  
14 to conclude that the position more likely than not is true, the  
15 court remains free . . . to grant summary judgment.").

16 Moreover, "[i]f the factual context makes the non-moving  
17 party's claim of a disputed fact implausible, then that party must  
18 come forward with more persuasive evidence than otherwise would be  
19 necessary to show there is a genuine issue for trial." *Blue Ridge*  
20 *Insurance Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998)  
21 (citing *Cal. Architectural Bldg. Products, Inc. v. Franciscan*  
22 *Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory  
23 allegations that are unsupported by factual data cannot defeat a  
24 motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045  
25 (9th Cir. 1989).

## 26 **Analysis**

27 To succeed in an action under 42 U.S.C. § 1983, plaintiffs  
28 must show that "(1) defendants acting under color of state law (2)

1 deprived plaintiffs of rights secured by the Constitution or  
2 federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338  
3 (9th Cir. 1986) (citations omitted). Retaliation claims are  
4 appropriate under § 1983 and require "[a] prisoner suing prison  
5 officials . . . to show that he was retaliated against for  
6 exercising his constitutional rights and that the retaliatory  
7 action does not advance legitimate penological goals, such as  
8 preserving institutional order and discipline." *Barnett v.*  
9 *Centoni*, 31 F.3d 813, 815-816 (9th Cir. 1994) (citations omitted).

10 Specifically, a viable First Amendment retaliation claim in  
11 the Ninth Circuit must include "five basic elements: (1) An  
12 assertion that a state actor took some adverse action against an  
13 inmate (2) because of (3) that prisoner's protected conduct, and  
14 that such action (4) chilled the inmate's exercise of his First  
15 Amendment rights, and (5) the action did not reasonably advance a  
16 legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559,  
17 567-68 (9th Cir. 2005) (citations omitted).

18 There is no dispute between the parties that the search did  
19 occur, so the first element of plaintiff Reed's retaliation claim,  
20 that "a state actor took some adverse action against an inmate,"  
21 has been met. (*Id.* at 567; see also, e.g., Def. Mot. Succ. Summ.  
22 J. 4; Compl. 5.) It is also "well established [in the Ninth  
23 Circuit] that among the rights they retain, prisoners have a First  
24 Amendment right to file prison grievances," and that "[r]etaliation  
25 against prisoners for their exercise of this right is itself a  
26 constitutional violation, and prohibited as a matter of 'clearly  
27 established law.'" *Brodhiem v. Cry*, 584 F.3d 1262, 1269 (9th Cir.  
28 2009) (citations omitted); see also *Bruce v. Ylst*, 351 F.3d 1283,

1 1288 (9th Cir. 2003); *Rhodes*, 408 F.3d at 567. The third element  
2 of plaintiff Reed's retaliation claim, that the prisoner's conduct  
3 allegedly inciting the retaliation claim was "protected," has  
4 therefore also been indisputably met. *Rhodes*, 408 F.3d at 567.

5 The outstanding elements are then the second element, which  
6 involves whether the defendants conducted the search *because* of  
7 plaintiff Reed's grievance filings, the fourth element, which  
8 involves whether the defendants' actions chilled plaintiff Reed's  
9 exercise of his First Amendment rights, and the fifth element,  
10 which involves whether the defendants' actions in searching  
11 plaintiff Reed's cell reasonably advanced a legitimate correctional  
12 goal. See *Rhodes*, 408 F.3d at 567-68.

13 With regard to the second element, in sharp contrast to the  
14 arguments made in their first motion for summary judgment (Def.  
15 Mot. Summ. J. 15-16), defendants have in their successive motion  
16 for summary judgment provided non-retaliatory reasons for why the  
17 search was conducted. Defendants have explained prison procedures  
18 regarding cell searches and have attached portions of the Washoe  
19 County Sheriff's Office Standard Operating Procedures governing  
20 facility searches (Def. Mot. Succ. Summ. J. Ex. 3) and detention  
21 safety inspections (*id.* at Ex. 4). Defendants allege that the  
22 search was conducted in compliance with typical procedure regarding  
23 searches. *Id.* at J. 7-8. Defendants state that random cell  
24 searches are generally more effective than planned ones, and that  
25 Defendants Hamilton and Tracy merely took advantage of an opportune  
26 moment to search the plaintiff's cell when he was not in it. *Id.*  
27 Defendants purport that neither defendant Hamilton nor Defendant  
28 Tracy knew of or had met the plaintiff prior to the day he filed

1 his grievance and his cell was searched, and therefore had no  
2 motivation to retaliate against him. *Id.* at 8. Defendants support  
3 their claims by attaching affidavits from defendant Tracy (*id.* at  
4 Ex. 1) and defendant Hamilton (*id.* at Ex. 2), as well as excerpts  
5 from the sworn testimony of defendants Tracy and Hamilton (*id.* at  
6 Ex. 5) at the Second Judicial District Court trial of CR 11-0026,  
7 the case in which plaintiff Reed was eventually convicted by a jury  
8 of weapon possession.

9       However, plaintiff Reed has also provided circumstantial  
10 evidence in support of his claim that the search was conducted as  
11 retaliation for his prison grievances. The Plaintiff alleges that  
12 after his cell was searched, Deputy Tracy "told [him] to get a  
13 lawyer, because [he had] a stupid amount of legal work." (Compl.  
14 5). Plaintiff Reed also claims that when he returned to his cell  
15 after the search, his "legal work [was] dumped on the bed mixed up  
16 and envelopes ripped apart" and that there was "paper floating in  
17 the toilet and pieces ripped up on the bed and the floor." *Id.* He  
18 further states that he asked if he could photograph the damage, but  
19 his request was denied. *Id.* These allegations arguably suggest a  
20 link between the search and plaintiff Reed's grievances regarding  
21 his alleged access to courts. Additionally, defendants, while  
22 making note of these allegations in their motion, have not disputed  
23 or denied them in any way. (Def. Mot. Succ. Summ. J. 3-5).

24       Furthermore, the defendants concede that the cell search  
25 occurred while the plaintiff was discussing his grievance with  
26 defendant Hamilton. *Id.* at 7-8. The defendants explain that  
27 defendant Hamilton found the plaintiff's grievance request in his  
28 mail box, whereupon he asked that plaintiff Reed be escorted

1 downstairs to discuss the grievance with him, and also ordered that  
2 his cell be contemporaneously searched. *Id.* While defendants do  
3 provide an alternative reason for the search, stating that it was  
4 conducted at that time "simply because it was an opportune moment  
5 to search [plaintiff Reed's] cell" (*id.* at 8), "timing can properly  
6 be considered as circumstantial evidence of retaliatory intent."  
7 *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995) (citations  
8 omitted).

9       The role of the court when deciding a motion for summary  
10 judgment is not to "weigh the evidence or determine the truth of  
11 the matters asserted" but only to "determine whether there is a  
12 genuine issue for trial." *Summers v. A. Teichert & Son, Inc.*, 127  
13 F.3d 1150, 1152 (9th Cir. 2000). In the case at hand, the parties  
14 have supplied conflicting evidence about the motivation behind the  
15 search. "[V]iew[ing] the evidence in the light most favorable to  
16 the nonmoving party," as this court is required to do in reviewing  
17 motions for summary judgment, the court finds that whether or not  
18 the defendants searched plaintiff Reed's cell in retaliation for  
19 his grievance filings is a question that must ultimately be  
20 resolved by the trier of fact. *Matsushita Elec. Indus. Co. V.*  
21 *Zenith Radio Corp.*, 475 U.S. 574, 574 (quoting *United States v.*  
22 *Diebold*, 369 U.S. 654, 655 (1962)).

23       With regard to the fourth element, defendants allege that "the  
24 record does not indicate that the search chilled plaintiff's First  
25 Amendment activity," and go on to cite the multiple grievances  
26 filed by the plaintiff as well as the case at hand as evidence that  
27 the plaintiff's First Amendment exercise was not in fact chilled.  
28

1 (Defs. Mot. Succ. Summ. J. 8). However, as the Ninth Circuit has  
2 made clear, the "the proper First Amendment inquiry asks" not  
3 whether an individual plaintiff was actually silenced or chilled in  
4 his exercise of his rights, but "'whether an official's acts would  
5 chill or silence a person of ordinary firmness from future First  
6 Amendment activities.'" *Rhodes*, 408 F.3d at 568 (9th Cir. 2005)  
7 (citations omitted). To hold otherwise would create a "vicious  
8 Catch-22" in which the only way for an inmate to obtain relief from  
9 retaliatory conduct would be to engage in behavior which itself  
10 would bar him from ever obtaining relief. *Id.* at 569. Thus,  
11 plaintiff Reed's grievances and actions in pursuing the case at  
12 hand are not evidence that his First Amendment rights have not been  
13 chilled. The question of whether the defendants' actions "would  
14 chill or silence a person of ordinary firmness" is an issue of  
15 material fact for trial. *Id.* at 568.

16 Finally, with regard to the fifth element, the defendants  
17 claim that "the search of plaintiff's cell reasonably advanced  
18 WCDF's legitimate correctional goal of protecting the institution's  
19 safety and security." Def. Mot. Succ. Summ. J. 8. The defendants  
20 have supplied information about the penological importance and  
21 value of inmate cell searches, particularly random searches, and  
22 have argued that the search was in compliance with regular  
23 operating procedures designed to ensure the safety and security of  
24 prison institutions. (See *id.* at 7-8, Ex. 1-4). However, "prison  
25 officials may not defeat a retaliation claim on summary judgment  
26 simply by articulating a general justification for a neutral  
27 process, when there is a genuine issue of material fact as to  
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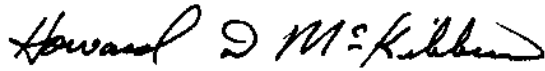
1 whether the action was taken in retaliation for the exercise of a  
2 constitutional right." *Bruce*, 351 F.3d at 1289 (citations  
3 omitted). While appropriately performed inmate cell searches  
4 undeniably serve a legitimate correctional goal, searches performed  
5 as a retaliatory response to an inmate's exercise of his  
6 fundamental constitutional rights do not. Thus, given that there  
7 is a genuine issue of material fact as to whether the search was  
8 conducted in retaliation, there is also a genuine issue of material  
9 fact as to whether the search "reasonably advance[d] a legitimate  
10 correctional goal." *Rhodes*, 408 F.3d at 568.

11 **Conclusion**

12 In accordance with the foregoing, the defendants successive  
13 motion for summary judgment is **DENIED**.

14 **IT IS SO ORDERED.**

15 DATED: This 18th day of November, 2013.

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19 UNITED STATES DISTRICT JUDGE  
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